

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

)

CRIMINAL NO. 102888

VERSUS

)

**LEE BOYD MALVO a/k/a
John Lee Malvo**

)

**INDICTMENT - CAPITAL MURDER (2
Counts) and USING A FIREARM IN THE
COMMISSION OF A FELONY**

ORDER

For the reasons stated in the Court's Opinion Letter dated February 12, 2003, a copy of which is incorporated herein, the Guardian Ad Litem's motion to compel the production of records under Virginia Code Section 16.1-266, is denied.

Entered on February 12, 2003.

JUDGE JANE MARUM ROUSH



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 246-2221 Fax: (703) 385-4432

MICHAEL P. McWEEBY
MARCUS D. WILLIAMS
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
LESLIE M. ALDEN
KATHLEEN H. MACKAY
JONATHAN C. THACHER
R. TERRENCE NEY
GAYLORD L. FINCH, JR.
RANDY I. BELLAWS
JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

JAMES KEITH
BURCH MILLSAP
BARNARD F. JENNINGS
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
RETIRED JUDGES

February 12, 2003

Todd G. Petit, Esquire
10511 Judicial Drive
Fairfax, Virginia 22030

Robert M. Ross, Esquire
Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064

Sharon E. Pandak, Esquire
County Attorney
1 County Complex Court
Prince William, Virginia 22192

Sterling E. Rives, III, Esquire
Hanover County Attorney
7516 County Complex Road
Hanover, Virginia 23069

In re: *Commonwealth v. Lee Boyd Malvo*, Criminal No. 102888

Dear Mr. Petit and Counsel:

Todd G. Petit, guardian *ad litem* for Mr. Malvo, has moved to compel the production of documents related to Mr. Malvo from Fairfax County

Police Chief J. Thomas Manger, Fairfax County Sheriff Stan G. Barry, Prince William County Police Chief Charlie T. Deane and Hanover County Sheriff V. Stuart Cook. In that the Court is unable to schedule a hearing on the motion to compel before Mr. Petit's appointment as guardian *ad litem* expires on February 18, 2003, Mr. Malvo's eighteenth birthday, the motion will be decided on the written submissions of counsel.

For the following reasons, the motion to compel will be denied.

Facts

Mr. Malvo, who is presently 17 years old, has been charged with two counts of capital murder and one count of using a firearm in commission of a felony. The Juvenile and Domestic Relations District Court of Fairfax County (the "J&DR Court") appointed counsel to represent Mr. Malvo. In addition, on November 8, 2002, the J&DR Court appointed Mr. Petit to act as Mr. Malvo's guardian *ad litem* pursuant to Va. Code Ann. § 16.1-266. See Order of J&DR Court dated November 8, 2002.¹

On November 14, 2002, Mr. Petit, acting as guardian *ad litem*, sought to obtain "any records relating to [Mr. Malvo]" in the possession of the police or sheriff departments of the Counties of Fairfax, Prince William and Hanover. Those jurisdictions refused to disclose the records of their ongoing criminal investigations of Mr. Malvo. Mr. Petit filed a motion to compel in the J&DR Court. On December 4, 2002, the J&DR Court ruled that Mr. Petit was not entitled to the requested records under Code § 16.1-266. Mr. Petit appealed that decision to this Court. On January 21, 2003, this Court ruled that the December 4, 2002 order of the J&DR Court was not appealable because it was not a final order. See Order dated January 21, 2003 in *Commonwealth v. Lee Boyd Malvo*, Juvenile No. 4499.

Meanwhile, in January 2003, the J&DR Court conducted a preliminary hearing and, having found probable cause, certified the charges against Mr. Malvo to the grand jury. See Code § 16.1-269.1(B) and (D).

¹ At the time of the appointment of the guardian *ad litem*, Mr. Malvo's mother was believed to be in Washington state or Florida. She has since been deported to Jamaica. Mr. Malvo's father is believed to be in Jamaica.

Later that month, the grand jury indicted Mr. Malvo. Now that the case is pending in this Court, Mr. Petit has renewed his requests for the records related to Mr. Malvo and the police chiefs and sheriffs have again refused to disclose those records.

Discussion

The Counties of Fairfax, Prince William and Hanover argue that Mr. Petit is not entitled to the records he requests under Code § 16.1-266. The Court agrees.

First the Court agrees with the arguments of the counties that the J&DR Court lacked the authority under Code § 16.1-266 to appoint both a guardian *ad litem* and counsel for Mr. Malvo. Under that statute, a juvenile who is the subject of a delinquency petition has the right to counsel. Counsel was appointed for Mr. Malvo at the earliest stages of the case. There is no statutory right to a guardian *ad litem* in addition to counsel. For example, in *Wilson v. Commonwealth*, 23 Va. App. 318, 325 (1996), the Court of Appeals held that “Code § 16.1-266(B), which mandates the appointment of counsel for juveniles appearing in delinquency hearings in courts not of record, states that juveniles enjoy only the right to counsel, not the right to guardians *ad litem*.”

Second, the Court finds no due process right to a guardian *ad litem* in addition to counsel for a juvenile who is the subject of a delinquency proceeding. In the landmark case of *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court held that a juvenile who is the subject of a delinquency proceeding that might result in the curtailment of his freedom has a due process right to counsel. Mr. Malvo has court appointed counsel: Mr. Arif and Mr. Cooley.

Third, this Court agrees with the counties that the J&DR Court did not have the discretion to appoint a guardian *ad litem* under the facts and circumstances of this case. Virginia’s statute is clear that a juvenile court has the discretion to appoint guardians *ad litem* under Code § 16.1-266(D) only if either a guardian *ad litem* or counsel is not mandated by Code § 16.1-266(A), (B) or (C). In this case, the J&DR Court was required to appoint

Mr. Malvo counsel under Code § 16.1-266(B). Having appointed counsel under that section, the J&DR Court was without the discretion to appoint a guardian *ad litem* under Code § 16.1-266(D). See also Opinion of the Attorney General 2002 Va. AG S-58, 02-046 (2002).

In sum, the Court agrees with the counties that the J&DR Court had no authority to appoint Mr. Petit to act as Mr. Malvo's guardian *ad litem*. Therefore, he lacks standing to request the documents in his capacity as guardian *ad litem*.

Even if Mr. Petit were properly appointed to act as guardian *ad litem* for Mr. Malvo, I find that Code § 16.1-266(E) does not grant him access to official records of an ongoing criminal investigation. The statute was intended to apply to records such as school, mental health and hospital records, not to records of an ongoing criminal investigation.² As I understand the facts, there are no school, mental health or hospital records pertaining to Mr. Malvo in Fairfax, Prince William or Hanover Counties. The only records those counties have pertaining to Mr. Malvo are records of an ongoing criminal investigation. Code § 16.1-266(E) does not supersede or supplant the rules of criminal discovery in Virginia.

Conclusion

For the forgoing reasons, the motion to compel will be denied. An order has been entered today reflecting the ruling contained in this letter (copy enclosed).

Sincerely,

— Jane Marum Roush

cc (all w/ encl.): Mr. Horan
Mr. Cooley
Mr. Arif

² Similarly, Virginia's Freedom of Information Act exempts records of a criminal investigation from its otherwise broad scope. Va. Code Ann. § 2.2-3706(F)(1) and (7).